

opinion of Dr. Brown. Further, respondent argues claimant's impairment was to his hip and his impairment should be based on a scheduled injury to the leg rather than to the body as a whole.

Claimant asks the Board to affirm the Award in all respects.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant works for respondent as a forklift driver. This job requires him to climb up and down onto a forklift from 20 to 30 times a day. In addition, he will sometimes need to climb onto a trailer. He said the bed of the trailer is over his head, and he needs to use his hands and feet to climb onto the trailer. On October 12, 2009, claimant was pulling on some woven plastic. He was unaware the plastic was stuck under a post, and when he pulled on the plastic he slipped and twisted. He said he felt a pop in his groin area. Respondent sent claimant to its company doctor, Dr. John Winblad, who is also claimant's personal physician. Dr. Winblad prescribed pain medication and sent claimant for physical therapy. Claimant was also sent to Dr. Chris Eckland for injections. Eventually, he was sent to Dr. John Schurman, a board certified orthopedic surgeon, who recommended hip replacement surgery. Claimant was sent by respondent to Dr. Paul Pappademos for a second opinion. He also recommended hip replacement surgery. Dr. Schurman was named claimant's authorized treating physician by the ALJ,¹ and claimant underwent hip replacement surgery on August 17, 2010. Claimant returned to light duty work on October 21, 2010, and on November 22, 2010, he was released to full duty.

Claimant continues to work for respondent. He testified he is slower at work and cannot get up onto and down off the forklift like he used to. He gets stiff at the end of the day, and he walks with a limp. He has taught martial arts for several years but has to do it differently now because he cannot do any of the kicks, nor can he do any free fighting with the kids.

Dr. John Schurman has a subspecialty in adult reconstruction, mostly hip and knee replacement. He initially saw claimant on February 10, 2010. Claimant told him he had suffered an injury in October 2009 when he fell backwards at work. He complained to Dr. Schurman of groin pain and pain with walking, weight-bearing, and at night. Dr. Schurman examined claimant and found he had limited movement of his hip and some irritability of his hip with rotational movement. X-rays showed claimant had degenerative arthritis.

¹ ALJ Order (June 22, 2010).

Dr. Schurman said the findings were not acute and he believed most, if not all, of claimant's degeneration preexisted his injury.

Because claimant already had undergone conservative treatment, Dr. Schurman progressed to surgical treatment of the hip. Claimant had a total right hip replacement on August 17, 2010. On October 15, 2010, Dr. Schurman released claimant to return to work with a lifting restriction of 50 pounds, 25 pounds repetitive lifting, and limited kneeling and squatting. On November 22, 2010, he released claimant to return to his job at full-duty. Dr. Schurman last saw claimant on January 26, 2011, for a routine visit. At that time, claimant had no complaints of pain and was getting up and walking well. His hip function was full.

Dr. Schurman, using table 64 of the *AMA Guides*,² rated claimant as having a 15 percent whole person impairment or a 37 percent right lower extremity impairment. He said the *AMA Guides* categorize the hip as part of the lower extremity.

Dr. Schurman acknowledged he did not take a history from claimant and record the points as required on table 65 of the *AMA Guides*. He said although not documented in his record, the content of the examination covered the areas as required by table 65. On October 15, 2010, claimant had a mild abductor lurch (limp) with his first two or three steps. That had resolved by the time he saw claimant on January 26, 2011. Claimant would have lost points on table 65 of the *AMA Guides* if he had a limp. If claimant could walk an hour at a normal pace, 2 miles per hour, he would walk two miles, exceeding the 6-block limit and would get the full score in that category. Claimant did not voice any problems with stair climbing or putting on shoes and socks or sitting. He did not voice any complaints about using public transportation. He had no deformities and would get a full score for all measurements. He had full range of motion.

Dr. C. Reiff Brown is a retired orthopedic surgeon who now performs independent medical evaluations. Claimant told Dr. Brown he was pulling a sheet of plastic reinforcement from under a stack of lumber when he wrenched his hip. Claimant denied having any hip problems before this injury. He was initially treated conservatively and was then referred to Dr. Schurman, who eventually performed a total hip replacement.

Claimant told Dr. Brown his hip was stiff at the end of the day and that his back bothered him some. He said the right side of his hip is sore and the pain goes down into his leg. If he sits too long, the left side of his hip is sore. He said some days are better than others and some days he has no pain at all. At times he has trouble getting up from a chair. He walks with a limp. He is stiff in the morning, and it takes him about an hour to

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

get it worked out. He uses a handrail to go up stairs. He can sit for about an hour. He can walk about 6 blocks. He has trouble putting on his shoes and socks.

Dr. Brown, using the *AMA Guides*, rated claimant as having a 20 percent permanent partial impairment of function to the whole body as a result of the work-related injury. He further opined that claimant would have to permanently avoid frequent long walks, frequent stairs and ladders, and frequent squatting. Dr. Brown acknowledged he had to make some subjective judgments in determining where to score claimant's pain on table 65. His report indicates that claimant had a mild antalgic limp, could ambulate 6 blocks without resting, had to use a handrail to climb stairs, had difficulty putting his shoes and stockings on, was able to sit at least an hour, and was able to use public transportation without difficulty.

Dr. Brown acknowledged that the hip is considered part of the leg in table 64 of the *AMA Guides*. He also agreed that based on his evaluation, claimant would have a 50 percent impairment to the right lower extremity, which would convert to 20 percent to the whole body.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.³ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁴ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁵

³ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁴ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁵ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

K.S.A. 44-510d states in part:

(a) . . . If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....
(16) For the loss of a leg, 200 weeks.

....
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.A.R. 51-7-8(3) states: “An injury involving the hip joint shall be computed on the basis of a disability to the body as a whole.”

In *Barbury*,⁶ the Kansas Court of Appeals held:

When an administrative agency is authorized to adopt regulations, those regulations are presumed valid, and the party who challenges them has the burden to show their invalidity. To be valid, the regulations must be within the agency’s statutory authority, and they must be appropriate, reasonable, and consistent with the underlying statutes.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. . . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. . . .

ANALYSIS

Respondent contends claimant’s impairment to his hip should be compensated as a scheduled injury to the leg rather than to the body as a whole. K.A.R. 51-7-8 provides that claimant’s injury to his hip joint is to be treated as a general body disability under K.S.A. 44-510e rather than a scheduled injury under K.S.A. 44-510d. The Board presumes

⁶ *Barbury v. Duckwall Alco Stores, Inc.*, 42 Kan. App. 2d 693, Syl. ¶ 1, 215 P.3d 643 (2009).

this regulation to be valid. It is respondent's burden to show otherwise. Although respondent argues the regulation is in violation of K.S.A. 44-510d, the Board disagrees and finds the regulation is consistent with that statute.

Next, respondent argues that claimant's percentage of functional impairment is 15 percent as opined by Dr. Schurman rather than 20 percent as opined by Dr. Brown. Claimant argues the reverse to be true. The Board has considered the testimony of both physicians together with the testimony of the claimant and the exhibits in the record and finds both expert medical opinions have merit and should be given equal weight. Claimant's permanent impairment of function is 17.5 percent.

CONCLUSION

Claimant has a 17.5 percent functional impairment to the body as a whole and is entitled to an award of permanent partial disability compensation based upon a 17.5 percent permanent partial general disability.

The Board notes that the ALJ did not award claimant's counsel a fee for his services even though the record contains a copy of the fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must seek approval from the Director.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated September 26, 2011, is modified to find claimant's permanent partial disability is 17.5 percent but is otherwise affirmed.

Claimant is entitled to 17 weeks of temporary total disability compensation at the rate of \$400.02 per week or \$6,800.34 followed by 72.27 weeks of permanent partial disability compensation at the rate of \$400.02 per week or \$28,909.45 for a 17.50 percent functional disability, making a total award of \$35,709.79.

As of January 20, 2012, there would be due and owing to the claimant 17 weeks of temporary total disability compensation at the rate of \$400.02 per week in the sum of \$6,800.34 plus 72.27 weeks of permanent partial disability compensation at the rate of \$400.02 per week in the sum of \$28,909.45 for a total due and owing of \$35,709.79, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
 Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
 John D. Clark, Administrative Law Judge